LEGISLATURE OF NEBRASKA

NINETY-NINTH LEGISLATURE

FIRST SESSION

LEGISLATIVE BILL 312

Introduced by Landis, 46

Read first time January 11, 2005

Committee: Revenue

A BILL

FOR AN ACT relating to the Employment and Investment Growth Act; to amend sections 49-801.01, 77-4101, 77-4104, 77-4105, 77-4106, 77-4110, and 77-4112, Reissue Revised Statutes of Nebraska, and section 77-4103, Revised Statutes Supplement, 2004; to change investment and employment requirements as prescribed; to redefine a term; to provide tax incentives; to require disclosure of certain information; to harmonize provisions; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

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Section 1. Section 49-801.01, Reissue Revised Statutes of Nebraska, is amended to read:

49-801.01. Except as provided by Article VIII, section 1B, of the Constitution of Nebraska and in sections 77-2701.01, 77-2714 to 77-27,123, 77-27,191, 77-4103, 77-4104, 77-4108, 77-5509, 77-5515, 77-5527 to 77-5529, and 77-5539 and section 6 of this act, any reference to the Internal Revenue Code refers to the Internal Revenue Code of 1986 as it exists on April 16, 2004.

Sec. 2. Section 77-4101, Reissue Revised Statutes of Nebraska, is amended to read:

77-4101. Sections 77-4101 to 77-4112 and section 6 of this act shall be known and may be cited as the Employment and Investment Growth Act.

Sec. 3. Section 77-4103, Revised Statutes Supplement, 2004, is amended to read:

77-4103. For purposes of the Employment and Investment Growth Act, unless the context otherwise requires:

(1) Any term shall have the same meaning as used in Chapter 77, article 27;

(2) Base year shall mean the year immediately preceding the year during which the application was submitted;

(3) Base-year employee shall mean any individual who was employed in Nebraska and subject to the Nebraska income tax on compensation received from the taxpayer or its predecessors during the base year and who is employed at the project;

(4) Compensation shall mean the wages and other payments subject to withholding for federal income tax purposes;

(5) Entitlement period shall mean the year during which

the required increases in employment and investment were met or exceeded, and the next ~~six~~ four years;

(6) Equivalent employees shall mean the number of employees computed by dividing the total hours paid in a year by the product of forty times the number of weeks in a year;

(7) Investment shall mean the value of qualified property incorporated into or used at the project. For qualified property owned by the taxpayer, the value shall be the original cost of the property. For qualified property rented by the taxpayer, the average net annual rent shall be multiplied by the number of years of the lease for which the taxpayer was originally bound, not to exceed ten years or the end of the third year after the entitlement period, whichever is earlier. The rental of land included in and incidental to the leasing of a building shall not be excluded from the computation;

(8) Motor vehicle shall mean any motor vehicle, trailer, or semitrailer as defined in section 60-301 and subject to licensing for operation on the highways;

(9) Nebraska employee shall mean an individual who is either a resident or partial-year resident of Nebraska;

(10) Number of new employees shall mean the excess of the number of equivalent employees employed at the project during a year over the number of equivalent employees during the base year;

(11) Qualified business shall mean any business engaged in the activities listed in subdivisions (b)(i) through (v) of this subdivision or in the storage, warehousing, distribution, transportation, or sale of tangible personal property. Qualified business shall not include any business activity in which eighty

percent or more of the total sales are sales to the ultimate consumer of food prepared for immediate consumption or are sales to the ultimate consumer of tangible personal property which is not (a) assembled, fabricated, manufactured, or processed by the taxpayer or (b) used by the purchaser in any of the following activities:

(i) The conducting of research, development, or testing for scientific, agricultural, animal husbandry, food product, or industrial purposes;

(ii) The performance of data processing, telecommunication, insurance, or financial services. Financial services for purposes of this subdivision shall only include financial services provided by any financial institution subject to tax under Chapter 77, article 38, or any person or entity licensed by the Department of Banking and Finance or the Securities and Exchange Commission;

(iii) The assembly, fabrication, manufacture, or processing of tangible personal property;

(iv) The administrative management of any activities, including headquarter facilities relating to such activities; or

(v) Any combination of the activities listed in this subdivision;

(12) Qualified employee leasing company shall mean a company which places all employees of a client-lessee on its payroll and leases such employees to the client-lessee on an ongoing basis for a fee and, by written agreement between the employee leasing company and a client-lessee, grants to the client-lessee input into the hiring and firing of the employees

leased to the client-lessee;

(13) Qualified property shall mean any tangible property of a type subject to depreciation, amortization, or other recovery under the Internal Revenue Code of 1986, or the components of such property, that will be located and used at the project. Qualified property shall not include (a) aircraft, barges, motor vehicles, railroad rolling stock, or watercraft or (b) property that is rented by the taxpayer qualifying under the Employment and Investment Growth Act to another person;

(14) Related persons shall mean any corporations, partnerships, limited liability companies, or joint ventures which are or would otherwise be members of the same unitary group, if incorporated, or any persons who are considered to be related persons under either section 267(b) and (c) or section 707(b) of the Internal Revenue Code of 1986;

(15) Taxpayer shall mean any person subject to the sales and use taxes and either an income tax imposed by the Nebraska Revenue Act of 1967 or a franchise tax under sections 77-3801 to 77-3807, any corporation, partnership, limited liability company, or joint venture that is or would otherwise be a member of the same unitary group, if incorporated, which is, or whose partners, members, or owners representing an ownership interest of at least ninety percent of such entity are, subject to such taxes, and any other partnership, limited liability company, S corporation, or joint venture when the partners, shareholders, or members representing an ownership interest of at least ninety percent of such entity are subject to such taxes; and

(16) Year shall mean the taxable year of the taxpayer.

The changes made in this section by Laws 1997, LB 264, apply to investments made or employment on or after January 1, 1997, and for all agreements in effect on or after January 1, 1997.

Sec. 4. Section 77-4104, Reissue Revised Statutes of Nebraska, is amended to read:

77-4104. (1) In order to utilize the incentives set forth in the Employment and Investment Growth Act, the taxpayer shall file an application for an agreement with the Tax Commissioner.

(2) The application shall contain:

(a) A written statement describing the plan of employment and investment for a qualified business in this state;

(b) Sufficient documents, plans, and specifications as required by the Tax Commissioner to support the plan and to define a project;

(c) If more than one location within this state is involved, sufficient documentation to show that the employment and investment at different locations are interdependent parts of the plan. A headquarters shall be presumed to be interdependent with any other location directly controlled by such headquarters. A showing that the parts of the plan would be considered parts of a unitary business for corporate income tax purposes shall not be sufficient to show interdependence for the purposes of this subdivision;

(d) A nonrefundable application fee of five hundred dollars. The fee shall be deposited into the Employment and Investment Growth Fund, which fund is hereby created. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act; and

(e) A timetable showing the expected sales tax refunds and what year they are expected to be claimed. The timetable shall include both direct refunds due to investment and credits taken as sales tax refunds as accurately as possible.

The application and all supporting information shall be confidential except for the name of the taxpayer, the location of the project, the amounts of increased employment and investment, and the information required to be reported by sections 77-4110 and 77-4113.

(3) Once satisfied that the plan in the application defines a project consistent with the purposes stated in section 77-4102 in one or more qualified business activities within this state, that the plans will result in either (a) the investment in qualified property of at least ~~three~~ <u>five</u> million dollars and the hiring of at least ~~thirty~~ <u>twenty-five</u> new employees or (b) the investment in qualified property resulting in a net gain in the total value of tangible property in this state of a type subject to depreciation, amortization, or other recovery under the Internal Revenue Code of 1986 of at least ~~twenty~~ <u>forty</u> million dollars, and that the required levels of employment and investment for the project will be met prior to the end of the ~~sixth~~ <u>fourth</u> year after the year in which the application was submitted, the Tax Commissioner shall approve the application. In determining the net gain in value for purposes of this subsection, all tangible personal property shall be valued in a manner consistent with the value determined for qualified property, and the total value on the

last day of each year shall be compared with the total value on the last day of the base year.

(4) After approval, the taxpayer and the Tax Commissioner shall enter into a written agreement. The taxpayer shall agree to complete the project, and the Tax Commissioner, on behalf of the State of Nebraska, shall designate the approved plans of the taxpayer as a project and, in consideration of the taxpayer's agreement, agree to allow the taxpayer to use the incentives contained in the Employment and Investment Growth Act. The application, and all supporting documentation, to the extent approved, shall be considered a part of the agreement. The agreement shall state:

(a) The levels of employment and investment required by the act for the project;

(b) The time period under the act in which the required levels must be met;

(c) The documentation the taxpayer will need to supply when claiming an incentive under the act;

(d) The date the application was filed; and

(e) A requirement that the company update the Department of Revenue annually on any changes in plans or circumstances which affect the timetable of sales tax refunds as set out in the application. If the company fails to comply with this requirement, the Tax Commissioner may defer any pending sales tax refunds until the company does comply.

(5) The incentives contained in section 77-4105 shall be in lieu of the tax credits allowed by section 77-27,188 for any project. In computing credits under section 77-27,188, any

investment or employment which is eligible for benefits under the Employment and Investment Growth Act shall be subtracted from the increases computed for determining the credits under section 77-27,188.

(6) A taxpayer and the Tax Commissioner may enter into agreements for more than one project and may include more than one project in a single agreement. The projects may be either sequential or concurrent. A project may involve the same location as another project. No new employment or new investment shall be included in more than one project for either the meeting of the employment or investment requirements or the creation of credits. When projects overlap and the plans do not clearly specify, then the taxpayer shall specify in which project the employment and investment belongs.

Sec. 5. Section 77-4105, Reissue Revised Statutes of Nebraska, is amended to read:

77-4105. (1) A taxpayer who has signed an agreement under section 77-4104 may elect to determine taxable income for purposes of the Nebraska income tax using the sales factor only. The election may be made for the year during which the application was filed and for each year thereafter through the eighth year after the end of the entitlement period. The election shall be made for the year of the election by computing taxable income using the sales factor only on the tax return.

~~(2)~~ (2)(a) A taxpayer who has signed an agreement under section 77-4104 shall receive the incentive provided in this subsection if the agreement contains one or more projects which together will result in the investment in qualified property of at least ~~ten~~ twenty million dollars and the hiring of at least ~~one hundred~~ eighty-five new employees. Such ~~ten million dollar~~ investment and hiring of ~~at least one hundred~~ new employees shall be considered a required level of investment and employment for this subsection and for the recapture of ~~personal property tax~~ benefits under this subsection only.

(b) The following property used in connection with such project or projects and acquired by the taxpayer, whether by lease or purchase, after the date the application was filed shall constitute separate classes of personal property:

~~(a)~~ (i) Turbine-powered aircraft, including turboprop, turbojet, and turbofan aircraft, except when any such aircraft is used for fundraising for or for the transportation of an elected official;

~~(b)~~ (ii) Mainframe business computers used for business information processing which require environmental controls of temperature and power and which are capable of simultaneously supporting more than one transaction and more than one user plus peripheral components which require environmental controls of temperature and power connected to such computers. Computer peripheral components shall be limited to additional memory units, tape drives, disk drives, power supplies, cooling units, and communication controllers; and

~~(c)~~ (iii) Personal property which is business equipment located in a single project if ~~(i)~~ (A) the business equipment is involved directly in the manufacture or processing of agricultural products and ~~(ii)~~ (B) the investment in the single project exceeds ~~ten~~ twenty million dollars.

(c) Such property shall be eligible for exemption from the tax on personal property from the first January 1 following the date of acquisition for property in subdivision ~~(2)(a)~~ (2)(b)(i) of this section, or from the first January 1 following the end of the year during which the required levels were exceeded for property in subdivisions ~~(2)(b) and (2)(c)~~ (2)(b)(ii) and (iii) of this section, through the sixteenth December 31 after the filing of the application. In order to receive the property tax exemptions allowed by subdivisions ~~(2)(a), (2)(b), and (2)(c)~~ (2)(b)(i), (ii), and (iii) of this section, the taxpayer shall annually file a claim for exemption with the Property Tax Administrator on or before May 1. The form and supporting schedules shall be prescribed by the Property Tax Administrator and shall list all property for which exemption is being sought under this section. A separate claim for exemption must be filed for each project and each county in which property is claimed to be exempt. A copy of this form must also be filed with the county assessor in each county in which the applicant is requesting exemption. The Property Tax Administrator shall determine the eligibility of each item listed for exemption and, on or before August 10, certify such to the taxpayer and to the affected county assessor. Notwithstanding any other provision of law, the Property Tax Administrator shall be allowed access to the applications and such other records of the Department of Revenue as necessary in order to determine the eligibility for exemption.

(3) When the taxpayer has met the required levels of employment and investment contained in the agreement, the taxpayer shall also be entitled to the following incentives:

(a) A refund of all sales and use taxes paid under the Nebraska Revenue Act of 1967, the Local Option Revenue Act, and sections 13-319, 13-324, and 13-2813 from the date of the application through the meeting of the required levels of employment and investment for all purchases, including rentals, of:

(i) Qualified property used as a part of the project;

(ii) Property, excluding motor vehicles, based in this state and used in both this state and another state in connection with the project except when any such property is to be used for fundraising for or for the transportation of an elected official;

(iii) Tangible personal property by the owner of the improvement to real estate that is incorporated into real estate as a part of a project; and

(iv) Tangible personal property by a contractor or repairperson after appointment as a purchasing agent of the owner of the improvement to real estate. The refund shall be based on fifty percent of the contract price, excluding any land, as the cost of materials subject to the sales and use tax; and

(b) A refund of the sales and use taxes paid under the Nebraska Revenue Act of 1967, the Local Option Revenue Act, and sections 13-319, 13-324, and 13-2813 on the types of purchases, including rentals, listed in subdivision (a) of this subsection for such taxes paid during each year of the entitlement period in which the taxpayer is at or above the required levels of employment and investment.

(4) <u>A taxpayer who has signed an agreement for one or more projects which result in the investment in qualified property of at least forty million dollars shall receive a credit equal to</u>

five percent of the investment made in qualified property at the project.

(5) Any taxpayer who qualifies for the incentives contained in subsections (1) and (3) of this section and who has added at least ~~thirty~~ twenty-five new employees at the project shall also be entitled to:

(a) A credit equal to ~~five~~ three percent of the amount by which the total compensation paid during the year to employees who are either Nebraska employees or base-year employees while employed at the project exceeds the average compensation paid at the project multiplied by the number of equivalent base-year employees. The credit shall equal four percent of such excess compensation if the wages for which the tax credits are sought are at least seventy-five percent of the Nebraska average weekly wage for the year of application. The credit shall equal five percent of such excess compensation if the wages for which the tax credits are sought are at least one hundred percent of the Nebraska average weekly wage for the year of application. The credit shall equal six percent of such excess compensation if the wages for which the tax credits are sought are at least one hundred twenty-five percent of the Nebraska average weekly wage for the year of application. For purposes of this subsection, Nebraska average weekly wage for the year of application means for any calendar year of application, the most recent average weekly wage paid by all employers in all counties as reported by October 1 by the Department of Labor.

For the computation of such credit, average compensation shall mean the total compensation paid at the project divided by the total number of equivalent employees at the project; and

(b) A credit equal to ~~ten~~ eight percent of the investment made in qualified property at the project in addition to any credit provided in subdivision (4) of this section for which the taxpayer may qualify.

The credits prescribed in subdivisions (a) and (b) of this subsection shall be allowable for compensation paid and investments made during each year of the entitlement period that the taxpayer is at or above the required levels of employment and investment.

The credit prescribed in subdivision (b) of this subsection shall also be allowable during the first year of the entitlement period for investment in qualified property at the project after the date of the application and before the required levels of employment and investment were met.

Sec. 6. Beginning January 1, 2006, and each January 1 thereafter, the investment thresholds in sections 77-4104 and 77-4105 shall be adjusted for inflation by the method provided in section 151 of the Internal Revenue Code of 1986, as amended. The investment thresholds shall be adjusted for cumulative inflation since 2005. If the resulting amount is not a multiple of one million dollars, the amount shall be rounded to the next lowest one million dollars.

Sec. 7. Section 77-4106, Reissue Revised Statutes of Nebraska, is amended to read:

77-4106. (1)(a) The credits prescribed in section 77-4105 shall be established by filing the forms required by the Tax Commissioner with the income tax return for the year. The credits may be used after any other nonrefundable credits to reduce the taxpayer's income tax liability imposed by sections 77-2714 to 77-27,135. The credits may be used to obtain a refund of sales and use taxes under the Nebraska Revenue Act of 1967, the Local Option Revenue Act, and sections 13-319, 13-324, and 13-2813 which are not otherwise refundable that are paid on purchases, including rentals, for use at the project.

(b) The credits may be used as allowed in subdivision (a) of this subsection and shall be applied in the order in which they were first allowed. Any decision on how part of the credit is applied shall not limit how the remaining credit could be applied under this section.

(c) The taxpayer may use the credit provided in subdivision (5)(a) of section 77-4105 to reduce the taxpayer's income tax withholding employer or payor tax liability under section 77-2756 or 77-2757 to the extent such liability is attributable to new employees at the project. To the extent of the credit used, such withholding shall not constitute public funds or state tax revenue and shall not constitute a trust fund or be owned by the state. The use by the taxpayer of the credit shall not change the amount that otherwise would be reported by the taxpayer to the employee under section 77-2754 as income tax withheld and shall not reduce the amount that otherwise would be allowed by the state as a refundable credit on an employee's income tax return as income tax withheld under section 77-2755.

The amount of credit used against income tax withholding shall not exceed the withholding attributable to new employees at the project. If the amount of credit for which the taxpayer is eligible exceeds this amount, the excess withholding shall be returned to the Department of Revenue in the manner provided in section 77-2756 and the amount of unused credit shall carry over to the extent authorized in subdivision (1)(d) of this section.

(d) Credits ~~The credit~~ may be carried over until fully utilized, except that such credit may not be carried over more than ~~eight~~ nine years after the ~~end of the entitlement period~~ year of application.

(2)(a) No refund claims shall be filed until after the required levels of employment and investment have been met.

(b) Refund claims shall be filed no more than once each quarter for refunds under the Employment and Investment Growth Act, except that any claim for a refund in excess of twenty-five thousand dollars may be filed at any time.

(c) Any refund claim for sales and use tax on materials incorporated into real estate as a part of the project shall be filed by and the refund paid to the owner of the improvement to real estate. A refund claim for such materials purchased by a purchasing agent shall include a copy of the purchasing agent appointment, the contract price, and a certification by the contractor or repairperson of the percentage of the materials incorporated into the project on which sales and use taxes were paid to Nebraska after appointment as purchasing agent.

(d) All refund claims shall be filed, processed, and allowed as any other claim under section 77-2708, except that the amounts allowed to be refunded under the Employment and Investment Growth Act shall be deemed to be overpayments and shall be refunded notwithstanding any limitation in subdivision (2)(a) of section 77-2708. The refund may be allowed if the claim is filed within three calendar years from the end of the year the required levels of employment and investment are met or within the period set forth in section 77-2708.

(e) Interest shall not be allowed on any sales and use taxes refunded under the Employment and Investment Growth Act.

(3) The appointment of purchasing agents shall be recognized for the purpose of changing the status of a contractor or repairperson as the ultimate consumer of tangible personal property purchased after the date of the appointment which is physically incorporated into the project and becomes the property of the owner of the improvement to real estate. The purchasing agent shall be jointly liable for the payment of the sales and use tax on the purchases with the owner of the improvement to real estate.

Sec. 8. Section 77-4110, Reissue Revised Statutes of Nebraska, is amended to read:

77-4110. (1) The Tax Commissioner shall submit an annual report to the Legislature no later than March 15 of each year.

(2) The report shall list (a) the agreements which have been signed during the previous calendar year, (b) the agreements which are still in effect, (c) the identity of each taxpayer, and (d) the location of each project.

(3) The report shall also state by industry group (a) the specific incentive options applied for under the Employment and Investment Growth Act, (b) the refunds allowed on the investment, (c) the credits earned, (d) the credits used to reduce the corporate income tax and the credits used to reduce the individual income tax, (e) the credits used to obtain sales and use tax

refunds, (f) the number of jobs created, (g) the total number of employees employed in the state by the taxpayer on the last day of the calendar quarter prior to the application date and the total number of employees employed in the state by the taxpayer on subsequent reporting dates, (h) the expansion of capital investment, (i) the estimated wage levels of jobs created subsequent to the application date, (j) the total number of qualified applicants, (k) the projected future state revenue gains and losses, (l) the sales tax refunds owed to the applicants, (m) the credits outstanding, and (n) the value of personal property exempted by class in each county.

(4) No information shall be provided in the report that is protected by state or federal confidentiality laws.

(5) By December 1, 1990, the Department of Revenue shall prepare a report with the available information required in this section for all prior years the act has been in effect. Information required in this section that is not available to the department for the report due December 1, 1990, shall be provided in the next annual report.

(6) Beginning with applications received on or after January 1, 2006, the report shall also state the following information itemized by project for the year ending the preceding December 31:

(a) The identity and location of the taxpayer;

(b) The number of new employees for which the taxpayer earned credits, the category determining the amount of credits earned as provided in subdivision (5)(a) of section 77-4105, and the amount of credits used;

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(c) The amount of new investment for which the taxpayer earned credits and the amount of credits used; and

(d) The amount of sales tax refunds for sales tax paid in connection with the project and the amount of sales tax refunds using credits.

Sec. 9. Section 77-4112, Reissue Revised Statutes of Nebraska, is amended to read:

77-4112. (1) The changes made in sections 77-4103 to 77-4105 and 77-4107 by Laws 1988, LB 1234, shall become operative for all applications filed on and after January 1, 1988. For all applications filed prior to January 1, 1988, the provisions of the Employment and Investment Growth Act as they existed immediately prior to such date shall apply.

(2) Section 77-4113 and the changes made in section 77-4104 by Laws 1996, LB 1290, shall become operative for all applications filed on or after May 1, 1996.

(3) The changes made in sections 77-4101 and 77-4103 by Laws 1999, LB 539, and section 77-4103.01 shall become operative for any taxpayer with an agreement in effect on or after January 1, 1999. Such changes and section 77-4103.01 shall be applied on a consistent basis for determining benefits for tax years beginning, or deemed to begin, on and after January 1, 1999. For all benefit determinations in tax years beginning, or deemed to begin, prior to January 1, 1999, the provisions of the Employment and Investment Growth Act as they existed immediately prior to such date shall apply.

(4) The changes made in sections 77-4101, 77-4103, 77-4104, 77-4105, 77-4106, and 77-4110 by this legislative bill and

section 6 of this act shall be operative for all applications filed on or after January 1, 2006.

Sec. 10. Original sections 49-801.01, 77-4101, 77-4104, 77-4105, 77-4106, 77-4110, and 77-4112, Reissue Revised Statutes of Nebraska, and section 77-4103, Revised Statutes Supplement, 2004, are repealed.